Supreme Court, U.S.
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86-423

NO.....

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

Peter Porcaro

Petitioner,

v

United States of America

Respondant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Peter Porcaro Pro Se

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10 pp

QUESTIONS PRESENTED FOR REVIEW

1. Should the government be allowed to use false, inaccurate, misleading testimony, information and or trickery and decite in obtaining an indictment from the grand jury.

2. Should the government be allowed to manipulate the grand jury into miscontruing evidence and or testimony.

3. Should the government pre-trial prosecutorial misconduct be tolerated or allowed merely because the defendant was convicted.

4. Is the government's prosecutorial misconduct extreme enough in this case to warrant dismissal of the indictment.

5. Was Petitioner's right to effective assistance of counsel violated when petitioner's trial counsel failed to object or file a motion for dismissal of the indictment based on the prosecutor's misconduct and or the false or misleading testimony given to the grand jury.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The petitioner, Peter Porcaro Pro Se, respectfully prays that a Writ of Certiorari Issue to review the judgement of the United States Court of Appeals for the First Circuit entered on February 21, 1986. **(A copy of the memorandum is retyped and is attached in Appendix A.).**

OPINION BELOW

The Court of Appeals entered its memorandum decision affirming the denial of Petitioner's §2255 motion. The court denied Petitioner's petition for rehearing on April 1, 1986. **(A copy of the order is retyped and is attached in Appendix B.).**

JURISDICTION

On February 21, 1986 and April 1, 1986, the Court of Appeals entered judgements

affirming denial of Petitioner's §2255 motion **(See Appendix A & B).** The jurisdiction of the court is invoked under 28 United States code §2255 to vacate, set aside, or correct sentence by a person in federal custody.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment 5

> Nor shall any person...be deprived of life, liberty or property, without due process of law...

United States Constitution, Amendment 6

> A defendant's right to effective assistance of counsel.

PETITIONER'S STATEMENT OF CASE

Petitioner was indicted on or about April, 1981 for violation of Title 18 U.S.C., Section 1343. On or about June, 1981 Petitioner was reindicted on a

superseding indictment for violation of Title 18 U.S.C., Section 1343.

Petitioner was a wholesaler of general merchandise (watches, cigarette lighters, aerosol products, jewelry, automotive products, fire extinguishers, etc.) and started selling distributorships in 1972 as a way to expand his business. For a specified investment a distributor would receive a quantity of merchandise and a route of retail store locations that Petitioner's company would establish for the distributor. The distributor's function would be to visit the retail store locations on a regular basis restocking displays with merchandise that has been sold, collecting

monies and reordering merchandise from Petitioner as the distributor's needs would determine.

On April 16, 1981 assistant US Attorney Joan Stanley appeared before the grand jury. The very first witness she called was Postal Inspector Kevin McDonough. Inspector MdDonough testified that I, the petitioner Peter Porcaro, and or my companies were "restrained and prohibited from selling or carrying on business any longer", because on October 26, 1976 Diversified Products "using the Diversified Products name" ordered some $26,000 in merchandise from companies throughout the U.S. after they were closed down by the Attorney General's

office and they kept on selling distributorships and doing business as usual, **(see April 16, 1981 grand jury transcript, pages 7 & 8, retyped in Appendix C and marked as C-1 - C-3)** Inspector McDonough again testifies to the grand jury that the Attorney General placed another restraining order on another of Porcaro's companies on May 5, 1977 but they continued business as normal and kept on selling distributorships and that again on August 4, 1977 the Attorney General's office enjoined them from doing business and attached their assets. McDonough further states that after the Attorney General closed down these people they contacted their distributors and asked them to write letters.

(See April 16, 1981 grand jury transcript Pg. 10, 11, & 12 retyped in Appendix and marked as C-4 - C-7)

After Inspector McDonough gave this testimony the Assistant U.S. Attorney then put on the stand five (5) distributors of mine who testified that they purchased a distributorship from me and/or my companies, paid money to and transacted business with me and my companies after October 26, 1976, after which time my company was supposed to have been shut down by the Attorney General and not supposed to be conducting any business according to Inspector McDonough's testimony.

After these 5 witnesses testified Postal Inspector McDonough was recalled to

testify. **(Grand Jury Tr. 154-155, retyped in Appendix and marked as C-8 - C-10)** Inspector McDonough again testified that after the October 26, 1976 restraining order when my company was supposed to have been out of business or restrained, enjoined from doing business by the Attorney General's office and yet Diversifed Products kept on ordering merchandise from a number of suppliers and defrauded them of $26,000 worth of merchandise.. Inspector McDonough then goes on to testify that several of my salesmen have already been convicted of mail fraud and one man is a fugitive from justice. This testimony strongly leads the grand jury into believing that those convictions were directly related to the matter they

were currently investigating **(grand jury Tr. Pg. 157 retyped in Appendix and marked as C-11)**

After Postal Inspector McDonough completed the above testimony the grand jury voted to indict me. If my own beloved mother was sitting on that grand jury she would have voted to indict me. There is but one serious problem here and that is the testimony that was presented to the grand jury was false, not just exaggerated a bit, but totally false and misleading and this testimony was so improper and prejudicial that it created a biased grand jury. The truth of the matter is that on October 26, 1976, I was served with a civil complaint from the Commonwealth of Massachusetts Consumer Protection Division which included a summons and a

restraining order which notified me of a hearing to be held on November 3, 1976 to show cause, why a restraining order should not be granted. Until the hearing on November 3, 1976 I was not to conclude or execute any contracts for the sale of distributorships, which I did not do, nor did the government allege that I did during this time period of 7 days. When I appeared in court on November 3, 1976 the Assistant Attorney General, Mr. Green, of the Commonwealth and I reached an out-of-court agreement whereby I would voluntarily agree to a stipulation to preliminary injunction which the Assistant Attorney General hand-drafted in the lobby of the court house whereby my companies would be allowed to continue doing

business, but would restrict certain claims from my advertising and sales presentations, unless such advertising and claims could be substantiated. **(See government trial exhibits 0153 to 0155 retyped in Appendix and marked as C-13 - 15)** I or my companies were never put out of business or prohibited from carrying on business any longer as Postal Inspector McDonough had testified to the grand jury.

I stated in my petition that the postal inspector knowingly used purjured testimony. I can say this because my wife and I and my lawyer personally discussed this with Inspector McDonough and gave him copies of the summons, restraining order and the hand-drafted stipulation

of Parties to Preliminary injunction at his request when he was conducting his investigaticn prior to my indictment and prior to his appearance before the grand jury. Furthermore, these very same documents were turned over to the grand jury under Subpoena of the Keeper of records, months prior to my indictment. The prosecutor knowingly allowed this tstimony to be presented to the grand jury even though the prosecutor knew or should have known that testimony to be false and misleading. As far as my salesmen being convicted of mail faud or being a fugitive, if in fact true, was not related to my case and the grand jury should not have been improperly misled into believing that their convictions were related to the

case the grand jury was currently investigating. The Postal Inspector and government knowingly provided the grand jury with this false or misleading testimony for one reason only, to influence the grand jury and to guarantee an indictment against Peter Porcaro.

The prosecutor used this trick and knowingly deceived the grand jury into indicting me, then, once indicted, the prosecutor knew it would then be a simple matter to admit to giving the grand jury wrong information. Then the prosecutor, to cover herself, would go back with a superseding indictment, down-playing the entire matter and again mislead the grand jury into indicting me. It's a sure way for the prosecutor to get

an indictment in a case that the prosecutor thinks the grand jury may not indict on if given the true facts of the case. It is very obvious that this is exactly what the prosecutor did. In addition, the prosecutor admits and makes reference to the October 26, 1976 restraining order. That document clearly stated that it is only a temporary order until a hearing is held on November 3, 1976.

Don't you think the prosecutor would have been interested in the results of that hearing? Why of course, however, the results of that hearing would jeopardize her case before the grand jury. So she fed the grand jury false information which guaranteed the prosecutor an indictment. This case gets even more incredible as I will explain.

Some 2½ months later the Assistant US Attorney Joan Stanley claims to find, for the first time, that document which shows I or my companies were never put out of business or shut down by the Attorney General's office as Postal Inspector McDonough had testified.

On June 26, 1981 Assistant US Attorney Joan Stanley and Inspector McDonough appeared before the grand jury to supersede the indictment. Stanley appeared bfore the grand jury and explained that when the grand jury indicted me last time all the records were not available then, but they are now because they got hold of the bankruptcy court records and found that some of the information given the grand jury before was wrong, so Stanley states that she will present

the correct information, then presented the grand jury with the superseding indictment. **(grand jury Tr. Pg. 3 retyped in Appendix and marked as C-16 - C-17)**

The document which shows I was never put out of business was a public record and all the prosecutor had to do was go to the court house and get a copy. The prosecutor had no problem getting all the other documents which this document would have been attached to and part of. This was an absurd story the prosecutor told the grand jury to cover up the real truth.

The fact is that Stanley went on to whitewash this whole matter to make it seem very routine and really a very unimportant change which will only take

a few minutes of the grand jury's time, she stated. Stanley basically tells the grand jury the very same story as before using different words. Stanley states that the new information shows tnat they were never restrained totally, it was that they were restrained from engaging in certain business. This statement is totally untrue and misleading **(June 26, 1981 grand jury transcript page 4 retyped in Appendix and marked as C-17 - C-19)**

Inspector McDonough is the only witness called to testify before the grand jury on the superseding indictment. He takes the stand and is asked by the prosecutor if since he last testified in the case if he in fact since learned that certain testimony and information given to the

grand jury was, in fact, incorrect. McDonough testifies that he doesn't know if that testimony and information was incorrect (when if fact he knows that testimony was incorrect) but that it might be clarified a bit more **(Grand jury Tr. Pg. 5, 6, retyped in Appendix and marked as C-19 - C-22)**

McDonough goes on to read to the grand jury several court documents emphasizing and repeating over and over the words refrain, cease and desist, continuing to create the false and misleading impression that I should not have been doing any business whatsoever. **(Grand jury Tr. Pg. 7-13 retyped in Appendix and marked as C-22 - C-30)**

The prosecutor now addresses the grand jury indicating names and dates of persons

I had correspondence with regarding the sale of a distributorship. The prosecutor then states; "so after the injunction was issued, in fact, they did business." **(Grand jury Tr. Pg. 13, 14 retyped in Appendix and marked as C-30 - C-33)**

Even though the prosecutor is fully aware that the injunction allowed me to continue doing buisness, the prosecutor falsely implies to the grand jury that I was not supposed to be doing business. These false and misleading statements by both Inspector McDonough and by the prosecutor were directly responsible for my indictment. The prosecutor even created the false impression that I was restrained from even corresponding with people.

The grand jury voted to indict me under the superseding indictment, based on this false and misleading testimony.

The facts are that I or my companies were never put out of business or enjoined from doing business.

When I was served with the complaint it included a summons and restraining order indicating a date to appear in court to show cause why a restraining order should not be issued. This was only a matter of a few days and in the time period I never did business, nor does the government allege that I did. the preliminary injunctions I entered into with the Attorney General allowed me to continue in business as usual, but I must refrain from making certain claims or representations unless I

could prove those claims.

I was never restrained or put out of business or not allowed to do business as the grand jury was led to believe by the prosecutor and Postal Inspector McDonough.

The Court of Appeals in its opinion dated February 21, 1986 agrees that the grand jury indicted petitioner on or about "April of 1981 based on false information." However, the court is being kind in that in describing the government's testimony before the grand jury, it used innocent terms such as inaccurate, wrong, misinformation or overstated testimony and that the actions of the government were <u>not egregious enough</u> to warrant dismissing an indictment after the defendant has been

convicted. This, the Court of Appeals stated, "will only do in truly extreme cases of egregious prosecutorial misconduct". The court states that the government could easily have prevented any misinformation from being presented to the grand jury and hints that petitioner's indictment would have been dismissed prior to petitioner's conviction had the government's egregious conduct been brought to the attention of the court prior to conviction. I strongly disagree with the Court of Appeals as to what is a truly extreme case of egregious prosecutioral misconduct, or that once convicted, the government's egregious prosecutorial misconduct doesn't matter (eventhough the misconduct was directly responsible for petitioner's indictment).

In petitioner's case it is very clear

and obvious what happened. On or about April 16, 1981, the Government's Assistant US Attorney Joan Stanley appeared before the grand jury and presented false information and testimony which was without question directly responsible for petitioner's indictment. The Assistant US Attorney Joan Stanley who investgated and prosecuted this case and the postal inspector who led the investigation of this case were both well seasoned and capable veterans in their fields. So it's very doubtful that they presented the grand jury with false information because of inexperience, ignorance or incompetence especially since the true facts of this case were given to them through subpoena of documents and through statements and documents given to them during their investigation.

Even the Court of Appeals agreed that it would have been very simple for the government to prevent this false information from being given to the grand jury all they had to do is get a copy of these public documents from the court house. Let me ask this questions? The government had no problem obtaining a copy of the temporary restraining order, so why would they have a problem obtaining a copy of the Stipulation for Preliminary Injunction which were all attached together?

The answer is obvious. The government knowingly and deliberately provided the grand jury with the false information to guarantee themselves an indictment. The government told the grand jury the court ordered me to close down

BEST AVA

business, cease and desist, stop selling distributorships because of fraudulent acts, stop doing all business permanently. Then the government parades in numerous witnesses who testified that they did business with the petitioner and or purchased a distributorship from the Petitioner and that I ordered some $26,000 worth of merchandise from various companies. The government then states to the grand jury..."So you see ladies and gentlemen of the grand jury, petitioner did in fact continue in business, selling distributorships, ordering merchandise, advertising, all fraudulently and in violation of the court's order to close down and to cease and desist". The grand jury had absolutely no choice based on the evidence the government presented them with but to vote for

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an indictment.

The facts are clear the government wanted an indictment but were aware that they had a weak case and resorted to what can only be described as outrageous egregious prosecutorial misconduct.

The government now had their indictment. But...the government knows it is easy to trick and manipulate the grand jury, but they also realize that their faulty indictment might jeopardize their conviction so they go back to the grand jury months later seeking to supersede the indictment. the government now gives the grand jury some scenario about not getting all the records from the state because of the bankruptcy court; but now they do have all the records and they have found some of the

information contained in the indictment they brought in April was wrong. So in order to do anything with the indictment they brought in April they will supersede it which will only take 15 or 20 minutes. The government has kept silent and has never even denied their prosecutorial misconduct in this case.

The Court of Appeals states in it's opinion that yes ... the government gave the grand jury inaccurate and overstated evidence upon which they based their indictment but that the government later superseded the indictment and at that time the grand jury was told the truth which was some of the information in the indictment was wrong and that the petitioner was never restrained totally

from doing business and the Temporary Restraining Order and Preliminary Injunction were read to the grand jury. The court goes on to state that here the corrections were made...even if not as forcefully as petitioner would have like and we see no basis for dismising the indictment.

Yes, the government did say these few words to the grand jury that they were given some wrong information and the government did read the Preliminary Injunction to the grand jury, however, those few words were meaningless to the grand jury as the government and postal inspector also continued to drill into the minds of and to say hundreds of words and statements to the grand jury to strongly imply and flatly state that the petitioner still was

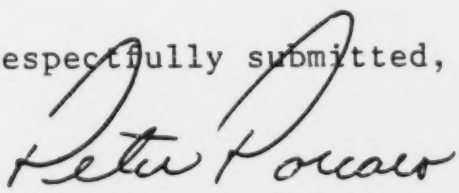
not supposed to be going business and again the grand jury voted to indict petitioner based on this same inaccurate or false information. The entire superseding indictment took only a few minutes and not one member of the grand jury asked even one question on the case which they heard months prior.

The government manipulated the grand jury to think what the government wanted them to think.

CONCLUSION

The actions of the government in this case were totally unfair, unethical and possibly illegal; and violated the constitutional rights of the petitioner and for the foregoing reasons petitioner Peter Porcaro respectfully requests that a Writ of Certiorari Issue to review the judgement of the U.S. Court of Appeals for the First Circuit.

Respectfully submitted,



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PROOF OF SERVICE

Peter Porcaro disposes and says that pursuant to Rule 28.4(A) of the court, he served the within Petition for Writ of Certiorari to the court of appeals for the first circuit on counsel for the respondant by enclosing a copy thereof in an envelope, first class postage prepaid addressed to:

1) Solicitor General of the U.S.
Department of Justice
Washington, DC 20530

2) Gary S. Katzman
A.U.S.A.
1107 J.W. Mccormack P.O.C.H.
Boston, MA 02109

3) U.S. Court of Appeals
For the First Circuit
1606 J.W. Mccormack P.O.C.H.
Boston, MA 02109

Signed under the pain and penalties

of purjury this day of

Peter Porcaro

Peter Porcaro

Commonwealth of Massachusetts

JULY 31ST, 1986

Then appeared Peter Porcaro who acknowledged the above ~~instrument~~ to be his free act and deed, before me.

Lloyd S. French
Notary Public
My com. ex. 8/12/88.

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 84-1808

PETER J. PORCARO

Petitioner, Appellant,

v.

UNITED STATES OF AMERICA,

Respondant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

(Hon. Andrew A. Caffrey, U.S. District Judge)

Before

Campbell, Chief Judge,

Breyer and Torruella, Circuit Judges.

Peter Porcaro on brief, Pro Se.

Gary S. Katzmann, Assistant United States Attorney, and William F. Weld, United States Attorney, on brief for appellee.

February 21, 1986

Per Curiam. Petitioner, convicted of mail fraud, appeals from the order dismissing his §2255 petition without a hearing. We deal with each of petitioner's contentions in the order presented in the petition and affidavit. We do not consider the supplemental allegation petitioner has included in his appelate brief, but rather restrict our view to the record. Glaros v. Perse, 628 F.d 679, 681 (1st Cir. 1980).

Ground 1: Variance between indictment,

proof and charge

Petitioner contends that the indictment was in effect impermissibly amended to conform to the proof in that the indictment charged a knowing use of the mails whereas the jury were charged that petitioner need not have knowingly used the mails but rather it was sufficient that petitioner performed certain acts under circumstances where it was reasonably foreseeable that the mails would be used.

To begin with, petitioner's argument fails because the superseding indictment does not read as petitioner claims. Rather the indictment charged, with respect to use of the mails, that petitioner "did place and caused to be placed" certain matter in the mail. This charge was substantially in line

with both the evidence and the jury instructions.

Petitioner's arguments seem to assume that a specific, consciously thought out intent to use the mails is an essential element of mail fraud. It is not. It is sufficient that the success of the scheme to defraud the depended in some ways on mailing and that defendant caused the mails to be used. A person causes the mails to be used where "he does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended..." Pereira v. United States, 347 U.S. 1, 8-9 (1954). Nor do we find the mail fraud statute as applied to petitioner unconstitutionally vague or violative

of the rule of lenity.

Ground 2. Unconstitutionality of mail fraud statute

Petitioner seems to argue that it is beyond Congress's constitutional power to enact a statute proscribing mail fraud. Petitioner is wrong. Congress "may forbid any...(mailing)...in furtherance of a scheme that it regards as contrary to public policy..." Bladders v. United States, 240 U.S. 391, 393 (1916).

Ground 3. Ineffective Asistance of Counsel

To establish a claim of ineffective assistance of counsel, petitioner would have to show both (1) that "counsel's representation fell below an objective standard of reasonableness" and (2) that "there is a reasonable probability

that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 52 U.S.L.W. 4565, 4570, 4572 (No. 82-1554) (U.S. May 14, 1984). In the present case, petitioner was denied a hearing at which to establish his ineffective assistance claim, and thus we must determine whether petitioner made sufficient factual allegations which, if true, would state a claim on which relief could be granted. United States v. Schaflander, 743 F.2d 714, 717 (9th Cir. 1984), cert. denied 105 S.Ct. 1772 (1985). We accept petitioner's allegations as true except to the extent they are contradicted by th record, inherently incredible, or conclusions rather than statements of fact. Mack v. United States 635 F.2d

20, 26-27 (1st Cir. 1980) we turn to petitioner's specific claims of ineffective assistance.

1. Failure to present favorable evidence

Petitioner's affidavit alleged, among other things, that petitioner informed counsel of eleven satisfied customers who would have testified that petitioner made no misrepresentations, did not use any high pressure sales tactics, fulfilled all promises, and made case refunds when required.[1] A brief review

1. Petitioner filed his own affidavit of what the witnesses supposedly would have testified to rather than affidavits from the witnesses themselves. While I would have been preferable to produce affidavits from the witnesses, in view of Rule 2(b) of the Rules Governing Section 2255 Proceedings which requires only that facts supporting the motion be set forth in "summary form" we cannot say that the district court could not have directed petitioner to supplement his filing with affidavits from the customers themselves see Rule 7(b) of Rules Governing Section 2255 Proceedings, but such a procedure was not invoked here, so far as we can tell.

of the evidence at petitioner's trial places the relevancy of satisfied customer evidence in perspective. Petitioner was convicted of numerous counts of mail fraud arising out of the sale by petitioner or his agents of a number of distributorships, the value of which had been grossly exaggerated. The prosecution's case consisted largely of the testimony of fourteen or so victims who, attracted by petitioner's advertisements and hyperbole, invested, and then lost, their money. A Massachusetts Assistant Attorney General who had investigated petitioner and obtained a preliminary injunction enjoining petitioner from using some of his more blantant advertising ruses also testified. he emphasized that during his negotiations with petitioner, he asked petitioner

to produce just one satisfied customer, but petitioner never did. The only defense witnesses were petitioner and his co-defendant who testified that they never intended to mislead or defraud anybody, that they attempted to satisfy all their customers' needs, and that they did not make any misrepresentations and tried to ensure that their agents made none.

Petitioner's argument is that against this background -- particularly the Assistant Attorney General's claim that petitioner had never produced even one satisfied customer -- had a number of truly satisfied customers been presented to the jury, petitioner's claim that he was running a legitimate business would have been greatly enhanced and petitioner would probably have had a

significantly better chance for acquittal.

It may well be that satisfied customer evidence, if it existed, would have been relevant and admissible with respect to petitioner's intent. See, e.g., United States v. Shavin, 287 F.2d 647, 652 (7th Cir. 1961) (attorney charged with a mail fraud scheme which consisted of submitting inflated personal injury claims to insurance companies on behalf of a number of clients should have been permitted to show the uninflated claims submitted on behalf of other clients). And, depending on the number of witnesses and the strength of their testimony, perhaps the outcome might have been different. On the other hand, we can envision circumstances werhe the decision not to call satisfied customers would be sustainable as rational trial tactics.

For example, if the so-called satisfied customers had also lost their investment, even though they might not have held the loss against petitioner, counsel could reasonably conclude their evidence would not have aided petitioner. Much depends on the circumstances, cf., Shraiar v. United States, 736 F.2d 817, 818 (1st Cir. 1984) (omitted evidence would not have contradicted evidence of defendant's guilt), and we cannot say that at the preliminary pleading stage at which the court dismissed the §2255 petition, petitioner had failed to state a claim. This does not necessarily mean that on remand petitioner will be entitled to an evidentiary hearing, however. Rather, the more expeditious course may be to require petitioner to obtain affidavits from the allegedly satisfied

customers and other persons, see Rule 7 of the Rules Governing Section 2255 Proceedings in the United States District Courts, and then, depending upon the content of the affidavits, to determine whether an evidentiary hearing is warranted.[2]

2. Counsel's failure to object to jury charges

Petitioner contends the charge impermissibly shifted the burden of proof concerning intent to petitioner. We have already rejected this argument in our opinion affirming petitioner's conviction. United States v. Porcaro, No. 82-1126, slip. op at 12-13 (1st Cir. April 22, 1983).

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2. Since this case must be remanded, we need not discuss the evidence enumerated in paragraphs 1A(1), (a), (b), (c), (f), (g), (h) of petitioner's affidavit, but rather leave these matters for determination in the first instance below.

3. Counsel's failure to object to trial judge's mannerisms, move for a mistrial or request judge to recuse self.

Petitioner contends that he was denied effective assistance of counsel in that counsel tolerated, without comment, improper and prejudicial remarks and mannerisms on the part of the trial judge.

While petitioner's §2255 petition does not set forth many details, his motion to recuse the trial judge from passing on his §2255 petition does, and we will consider the allegations set forth therein as if incorporated by reference into the §2255 petition.

Petitioner alleged, under penalty of perjury, that, during trial

> "(t)he trial judge would look at the jury and make faces, shake his head

in disbelief, look at the ceiling... use obvious jesters and mannerisms whenever defense witnesses testified conveying the impression to the jury that the defense witness should not be believed. Yet whenever a government witness testified the trial judge would express a genuine interest and nod his head in approval looking directly at the witness then at the jury."

These allegations are uncontradicted and therefore, at this stage, must be accepted as true. If such pervasive nonverbal communication took place, counsel should have objected and called the matter to the judge's attention. See Coleman v. DeMinto, 730 F.2d 42, 47 n.5 (1st Cir. 1984).

The government, relying on Buckelew v. United States, 575 F.2d 515 (5th

Cir. 1978), argues the allegations do not rise to the level of a constitutional violation cognizable in a §2255 proceeding. We disagree. The conduct alleged in Buckelew was not as pervasive as that alleged here, and Buckelew does not foreclose entertaining petitioner's claim in a §2255 proceeding.

At this preliminary pleading stage, we cannot say that no claim of ineffective assistance of counsel was stated with respect to counsel's failure to object to the alleged judicial misconduct, and thus it was error to summarily dismiss this aspect of the §2255 petition.

4. Statute of limitations.

Petitioner contends counsel was ineffective in that he failed to notice that count 13 was barred by the statute of limitation. Count 13 referred to a

mailing which occurred on or about October 26, 1976. This was within five years of June 26, 1981, the date petitioner was indicted, and hence count 13 was not barred by statute of limitations. See 18 U.S.C. §3282.

5 and 6. Closing arguments

We have reviewed the closing arguments and see no basis for an ineffective assistance of counsel claim based either on the failure to object to the prosecution's argument or the content of the defense's closing argument.

7. Counsel's failure to object to trial judge's effort to coerce a guilty plea.

Petitioner alleged in his motion for recusal as follows:

> "The trial judge, through his law clerk, indicated that in exchange

> for a guilty plea, the sentence would be one year. The Court later after trial, sentenced the petitioner to a three year term. This is clearly additional punishment deliberately inflicted for the purpose of denying petitioner his right to a trial by jury."

The trial judge's making of a plea offer, if it occurred, would appear to have violated Red.R.Cr.P. 11 (E) (1) ("the cout shall not participate in any such (plea) discussions"), see United States v. Adams, 634 F.2d 830, 834-836 (5th Cir. 1981) (judge's offer of a four year sentence in return for guilty plea violated Rule 11 and requires defendant, who was convicted after pleading not guilty, to be resentenced before another judge); United States v. Werker, 535 F.2d 198, 201 (2nd Cir.), cert. denied

sub nom Santo-Figueroa v. United States, 429 U.S. 926 (1976), and depending upon all the circumstances, conceivable could give rise to an appearance of vindictive sentencing. See Longval v. Meachum, 693 F.2d 236, 238 (1st Cir. 1982), cert. denied, 460 U.D. 1098 (1983). Consequently, this claim should receive further attention on remand.

8. Counsel's failure to object to court not having read the pressentence report. At sentencing, counsel moved to correct factualinaccuracies in specific paragraphs of the pre-sentence report. The court indicated that in those cases which go to trial and the court hears all the evidence, it does not read the part of the presentence report setting forth the official version of the case. The court thus having indicated it would

not rely on the alleged inaccuracies, counsel did not orally pursue the matter further. This procedure was acceptable and hence does not establish ineffective asistance of counsel.

Ground 4. Grand Jury Selection

Petitioner contends the grand jury which indicted him was unconstitutionally selected in that lawyers, doctors, professionals, teachers and others of advanced education were systematically excluded. Further, he says, the percentage of blacks on the panel was less than the percentage of blacks in the population as a whole. Objections to the compositin to the grand jury are required to be filed prior to trial, Fed.R. Cr.P. 12(b)(2), and, absent cause and prejudice, cannot be challenged for the first time in a §2255 motion. Davis v. United State

411 U.S. 233, 242 (1973). While petitioner does not explicitly so state, presumably he relies on ineffective assistance of counsel to excuse his procedural default and presumes prejudice is established. Section 6 (c) of the Plan for Random Selection of Jurors for the Federal District of Massachusetts finds as a fact that jury service by members of certain groups would entail undue hardship or extreme inconvenience to the members and permits such persons, on individual request, to be excused. Among the groups so treated are registered physicians, surgeons, dentists, pharmacists, and nurses actively engaged in the practice of such profession, teachers, and lawyers. Given the lack of success challenges to similar jury selection plans have had, see United States v. Van Scoy, 654 F.2d 257, 262-263 3rd Cir.), cert. denied,

454 U.S. 1126 (1981); United States v. United States, 442 U.S. 913 (1979), we see no basis for an ineffective assistance of counsel claim to excuse petitioner's procedural default. Furthermore, had petitioner timely moved to dismiss the indictment under 28 U.S.C. §1867 on the ground of improper jury selection he would have been required to file a sworn statement of facts showing substantial failure to comply with U.S.C. §1861 et. seq. before being entitled to an evidentiary hearing. No less should be required in a belated challenge under §2255 cf., United States v. D'Alora 585 F.2d 16, 22 (1st Cir. 1978) (constitutional challenge to jury panel did not comply with Jury Selection and Service Act and therefore was properly denied without a hearing). Hence, even were the untime-

liness of the challenge to the grand jury to be excused, petitioner's petition failed to set forth sufficient facts to entitle him to an evidentiary hearing.

Ground 5. Government's knowing presentation of perjured testimony to grand jury

Petitioner alleges Postal Inspector McDonough gave perjured testimony to the grand jury. The drift of the inspector's initial testimony was that petitioner had been ordered by the courts and Attorney General's Office to stop doing business, but that petitioner, in defiance of the order, kept ordering merchandise and selling distributorships. In fact, while initially a temporary restraining order (TRO) had issued against petitioner prohibiting him from executing further distributorship contracts, the TRO was

shortly later superseded by a stipulation for preliminary injunction which forbade certain practices such as false advertising but did not otherwise require petitioner to cease altogether all business activity. This, the inspector's initial testimony was inaccurate in that it overstated the preliminary injunctive order. Corrections, however, were later made, and a superseding indictment was returned. At that time, the grand jury was told that some of the information in the indictment was wrong in that petitioner had never been restrained totally from doing business, and the RO and preliminary injunction were read to the grand jury.

It is true, as petitioner points out, that the TRO and preliminary injunction

were public documents which the prosecution could have obtained at an earlier point and thereby prevented any misinformation from being presented to the grand jury in the first place. The sanction, however, of dismissing an indictment after a defendant has been convicted of an offense is employed in only truly extreme cases of egregious prosecutorial misconduct. United States v. Brown, 602 F.2d 1073, 1077 (2d Cir.), Cert. denied,, 444 U.S. 952 (1979). Here, where corrections were made -- even if not as forecefully as petitioner sould have liked -- we see no basis for dismissing the indictment.

The inspector also testified that some of petitioner's salesmen had been convicted of mail fraud. Petitioner indicated he noes not know whether this testimony

was false, but he maintains that regardless of its truth, it was irrelevant and prejudicial because unrelated to his case and should not have been presented to the grand jury. It is not apparent from the small transcript exceept petitioner has presented how related or unrelated petitioner's and his salesmen's activities were, but in any event the short passage to which petitioner points is insufficient to warrant dismissal of the indictment.

Except with respect to three claims, the §2255 petition was properly dismissed without a hearing. Consequently, the order dismissing petitioner's §2255 petition is affirmed except with respect to ground 3, part 1 (failure to present favorable evidence), ground 3, part 3 (failure to object to court effort

to coerce a guilty plea). In all the circumstances, proceedings on remand relative, at least, to ground 3, parts 3 and 7 should be held before another judge. Cf. Arby v. United States, 425 F.2d 717, 719 (5th cir. 1970) (allegations that trial judge made prejudicial remarks to be passed upon by another judge). in remanding we do not, of course, intimate an opinion regarding the merits of the allegations to be considered on remand.

So ordered.

B-1

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 84-1808

PETER J. PORCARO,

Petitioner, Appellant,

v.

UNITED STATES OF AMERICA,

Respondent, Appellee.

Before

Campbell, Chief Judge,

Breyer and Torruella, Circuit Judges.

MEMORANDUM AND ORDER

Entered April 1, 1986

Petitioner has moved for reconsideration of a portion of our opinion. Petitioner contends that count 13 of the indictment was barred by the statute of limitations and that hence petitioner received ineffective assistance of counsel since counsel did not move to dismiss count 13.

The relevant statue of limitations, 18 U.S.C. ¶3282, is five years. The indictment was returned on June 26, 1981. Count 13 concerns a letter from one of petitioner's customers, a Mr. Condon, dated October 26, 1976. This date is within five years of the indictment, and hence there is not obvious defect.

Petitioner argues, however, that there is no direct eidence petitioner ever received this letter. Regardless

whether receipt of the letter was necessary to the government's case, it would have been permissible for the jury to conclude, from Mr. Condon's testimony concerning mailing, that the letter was received. See 1 J. Weinstein and M. Berger, Weinstein's Evidence 303-20 (1985).

Petitioner may also be arguing that because the letter was sent by a customer -- one of the alleged victims of the distributorship fraud -- and not by petitioner, it is not a mailing in execution of the fraud and therefore cannot serve as a predicate for a mail fraud count. It is true that there are circumstances in which courts have on luded that letters sent by victims could not be viewed as furthering a defendant's fraudulent scheme and con-

sequently could not serve as the basis of a mail fraud charge. See, e.g., United States v. Maze, 414 U.S. 395 (1974) (fraudulent scheme -- unauthorized use of a credit card -- was completed once defendant had received goods and services and consequently the suppliers' mailing of invoices to the credit card company were not mailings for the purpose of executing the fraudulent scheme). On the other hand, there are situations where a victim's letter can be an integral part of the fraudulent scheme and thus can support a mail fraud charge See, e.g., United States v. Brutzman, 731 F.2d 1449, 1454 (9th Cir. 1984) (letters from investors seeking refunds sent in response to defendant's assurances that refunds would be available were mailing "for the purpose of executing

the scheme"); United States v. Toney, 598 F.2d 1349, 1352-1354 (5th Cir. 1979) (letters from victim's attorney threatening suit and demanding that defendant repurchase victim's inventory sent after defendant, in an attempt to lull victim into believing disput might be settled amicably, and requested victim to specify his difficulties could be found to have been mailings in furtherance of the lulling aspect of the fraudulent scheme), Cert. denied, 444 U.S. 1033 (1980).

We view the letter in context. As part of his scheme to induce the purchase of distributorships, defendant showed potential purchasers, including Mr. Condon, a projected earnings chart and represented that his company would repurchase unsold products if, at the end of one year, the purchaser had failed

to earn a certain profit which, in Mr. Condon's case, was to be $10,000 on his initial investment of $3,994. The written distributorship contract specified that if the distributor decided to elect the buy-back option, he was required to notify the company by registered mail.

After a year of servicing his Scripto lighter accounts, Mr. Condon's total gross business was only $946. Consequently, pursuant to the buy-back agreement, he, by letter dated October 26, 1976 (the count 13 letter) notified petitioner he wished petitioner to repurchase the unsold lighters. Mr. Condon also stated in the letter that, having followed petitioner's newspaper advertisements for other products such as timex, he was interested in the poss-

ibility of another product line. Thereafter, Mr. Condon called petitioner, and petitioner told Mr. Condon to remove the inventory from the store and they would discuss matters later.

Against this background, the October 26, 1976 letter could be viewed as an integral part of petitioner's fraudulent scheme. The buy-back offer was a prime feature of the distributorship contracts. Mr. Condon's letter was sent in order to set in motion this very buy-back provision. Unlike the situation in Maze where defendant had secured his ill-gotten gains before the mailings in question were sent and the success of his scheme was not dependent upon the mailings, in the present case defendant's finances stood potentially to be affected by further dealings stemming from

Mr. Condon's letter. Depending upon how vigorously Mr. Condon pressed his buy-back rights, petitioner, in order to forestall complaints, might have felt obligated to honor the repurchase part of the agreement, which, of course, would have required an expenditure reducing petitioner's gross receipts. Furthermore petitioner's continuing distributorship advertisements coupled with the conversation following the sending of the October letter manifested the possibility of future dealings and, perhaps, a renewed hope on Mr. Condon's part of eventually realizing the projectd profits. As long as business relations were still ongoing, Mr. Condon might be alayed from registering complaints with authorities or otherwise taking action to impede the success of petitioner's

distributorship scheme. In these circumstances, the October 26, 1976 letter was sufficiently closely related to petitioner's scheme to support the mail fraud count.

The motion for rehearing is denied.

By the Court:

Francis P. Scigliano
Clerk.

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Whether he did not make the guaranteed earnings or whether he just wanted out of the business, Diversified Products promised to buy back. And the people were led to believe that Diversified Products would buy back their initial cost of the distributorship minus whatever inventory had been sold.

On or about October 26, 1976 the Attorney General's office filed a restraining order prohibiting Diversified Products from selling or from carrying on business any longer.

Q. Do you know the reason why that order was filed?

A. Yes, it was for deceptive sales practices based on complaints from many people who had purchased the distributorships.

It's interesting to note that after October 26 of 1976 Diversified Products, using the Diversified Products name, ordered some $26,000 in merchandise from different companies throughout the United States to get some merchandise into their place. Beginning around, Diversified Products after they were essentially closed down by the Attorney General's office, they kept on selling distributorships, kept on maintaining business as ususal, telling people who already purchased distributorships that they were still continuing on in business. They kept on advertising. There were people who answered a Diversified Products advertisement but who were eventually sold the Universal Marketing Corporation distributorship.

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Universal Marketing Corporation was incorporated on March 1, 1977. For Universal Marketing the president, instead of Peter Porcaro was Francis Grenga, and the National Director of Marketing was Peter Porcaro. Universal Marketing had essentially the same contractual material, same high pressure sales techniques were used, projected earnings charts. The advertisements were similar, only the locations usually differed and the product was primarily Duracell Batteries rather than the Radio Rack even though the other merchandise was sold somewhat. This company, Universal Marketing, took the Duracell ad and more or less associated themselves with Duracell. The newspaper

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They would sell. If they would sell one distributorship for $8,000, they might get $5,000 commission, and then the rest would be taken care of from Framingham. The base of operations was Framingham. Most of the work was done in Framingham. The Norwood office was just a little showroom.

The earning potentials were the same, th people from Universal Marketing would tell perspective distributors that they were partners in progress, they were very strict requirements for a distributor, primarily a willingness to learn and aggressiveness to work. But it appeared the primary factor was if the person had the money to put up front.

The Attorney General's office placed a temporary restraining order against Universal, for, again, deceptive advertisements. making misrepresentations of salaries. And, also, there's one other thing that skipped my mind, that on May 5, 1977. The company continued business as normal. They kept on selling distributorships and on August 4, 1977 the

Tr. 11

Attorney General's office enjoined them from doing business and attached their assets. They kept on doing business after August 4, 1977 until finally in December they declared bankruptcy, they filed for bankruptcy. And it appears that that is the end of it.

Now, Throughout this period the Duracell

Company, P.R. Mallory Company located in Connecticut, was refusing to sell these people batteries. They completely refused. There was quite a bit of correspondence, Mallory saying stop associating yourself with our companies, Universal writing back saying we will stop there or we are not doing this. Things of that sort. There are many misrepresentations. The primary factor was to sell a person and get out.

Now, as far as our investigation has informed us so far, a conservative estimate of people sold Diversified Product distributorships would be 20. A conservicative number for Universal would be 60. For those people operating the program as was, no one made their initial investment back, whether the investment was $3,995, $4,995, $8,000

or $12,000. There was no

Tr. 12

indication of anyone making that money back.

Shortly after the Attorney General close these people down they contacted some of these most recent sales and asked the distributors to write letters of

Q. When you say "they", who?

A. Primarily Peter Porcaro. He was the primary factor behind this. Peter had answered most of the correspondence. Grenga was primarily a locator, and by his own admission he really didn't know that much about the business. I don't know if you want me to get into the misrepresentations.

Q. O, yes. That's why we are here.

A. Quite a few misrepresentations were made by some of the salesmen, by Porcaro,

on occasion by Grenga. They misrepresented the buy back guarantee. When a person would come to these people for the initial sales meeting they would show the people the display cases, tell people what they could expect. And they had three primary documents that were used to sell the people.

The first one was the

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KEVIN MCDONOUGH

having been previously duly sworn, was examined and testified as follows:

EXAMINATION

BY MS. STANLEY:

Q. For the record, are you the same Kevin McDonough that testified this morning?

A. Yes, I am.

Q. Now, first of all, Mr. McDonough, a couple of things we did not ask you this morning. In the course of running these various businesses Diversified purchased merchandise from a number of reputable companies, did they not?

A. They did.

Q. Could you tell us first of all what companies they purchased merchandise from?

A. I could read them off to you.

Q. Why don't you quickly let us know what they are and how much total merchandise was involved?

A. These are primarily companies, these are companies that were mentioned in the bankruptcy proceedings, so obviously these are creditors, these people are owed money by Diversified.

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Products. I did tally up the numbers of companies and the total dollar amount. Companies were supplied merchandise after the October 26, 1976 restraining order. So, in other words, they were put out of business by the Attorney General's office, and yet they kept on ordering merchandise from these companies and never paid for it. Companies such as Scripto, Marlo Company, Elcore Instruments, Panasonic Electronics, various newspapers, Crown Morning Corporation, Standcraft Products, Components, Specialists, Hale Brothers Watches, Imperial Camera, Butane Products Corporation, Martell Watch Company, for a total amount of over $26,000. Again, Mr. Grenga told me that the merchandise from Diversified Products was also used

by Universal Marketing. So it appears the merchandise just went from one company into another.

Q. Now, Agent Mcdonough, we have just gotten through reading through the indictment and I've read the mail counts and wire counts to them. Have you read the indictment?

A. Yes, I have.

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person behind the application of examiners was a Larry Grant. I haven't updated this since 1978. But in 1978 he had been convicted of mail fraud for similar distributorships and at that time he was a fugitive. Clay Lawrence was the head of a Dina Fluid in Pennsylvania. He is being investigated at this point by postal inspectors.

Q. What about Augsdell and Midland?

A. Augsdell is the primary person behind Midland. He has been convicted. He is on probation now. He has been convicted of mail fraud. I have contacted him and he would cooperate with us in this investigation. These were the primary contract salesmen for Universal Marketing.

MS. STANLEY: Do you have any other questions with regard to this?

A JUROR: During your investigation did you contact Mallory Batteries?

THE WITNESS: No, I didn't. Excuse me, I did send them a circular and they told me how much Diversified or these different corporations owed them. So I did contact them by letter, by correspondence.

COMMONWEALTH OF MASSACHUSETTS

Middlesex, SS. Superior Court

No. 76-5358

Commonwealth of Massachusetts
Plaintiff
Diversified Products Corporation
Defendant

Stipulation of Parties to Preliminary Injunction

Now comes the plaintiff and the defendant and stipulate as to the entry of a preliminary injunction as follows:

(1) That the defendants be enjoined from concluding or executing any contract for the sale of distributorships and from receiving any monies from the sale of distributorships based upon advertising which is not in accordance with the terms of this preliminary injunction.

This shall not preclude the defendant from providing goods and services to distributors not presently parties to this complaint.

(2) That the defendants be enjoined from advertising the sale of distributorships by the use of (a) Projected earnings for which there is no substantiation based on past performance of such distibutorships. (b) Statements alleging that the distributorship accounts selected will be "high traffic" accounts unless same can be based upon surveys or market data substantiating such statements. (c) Making any statements as outlines in (a) and (b) above in any sales presentations to potential purchasers of distriutorships.

Diversified Products Corp.
by its attorney
Richard J. DeAngeles
P.O. Box 2526
One Edgell Rd.
Framingham, MA 237-1180

Commonwealth of Massachusetts
William L. Green
Assistant Attorney General
Consumer Protection Divisio
One Ashburton Place
Boston, MA 727-8191

November 3, 1976

By the Court

November 3, 1976

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MS. STANLEY: We did a case involving people who were using franchises, a guy name Porcaro and Grenga, they worked with Universal Marketing. At that time I think I told you, I'm not sure, that we had not gotten all of the records from the Commonwealth of Massachusetts and we had not been able to because of the Bankruptcy Court records. Since that time we got hold of the Bankruptcy Court Records, we got hold of the re-straining orders and injunctions that were issued against these companies, and found that some of the information contained in the indictment that we brought in April that we gave you was wrong.

So in order to do anything with the indictment we're going to supersede the indictment. So what we're going

to do this morning is take 15 or 20 minutes. You have heard most of the information. Now if you want to hear more, I have the transcripts here and I can read back to you anything you want to hear. If you don't want to hear too much, the agent is here and I'm going to have him read the portions of the restraining orders and injunctions to tell you exactly what it was they were restrained from

Tr. 4

doing, then explain what they did as a result of it, because that information was incorrect, then present you with the superseding indictment.

First thing, do you want to hear any part of the information that you got before? Now in April, besides the agent you heard from five victims, Mr. Condon,

Mr. Campbell, Mr. Hincks, Mr. Latham and Mr. Maquire. Do you want to hear any of that over?

THE FOREMAN: No.

MS. STANLEY: Do you all remember it?

THE FOREMAN: Yes

MS. STANLEY: Then so basically what this is is that when we got the information that we didn't have before, we found that they had never been restrained totally from doing business. What it was, was they had been restrained from engaging in certain businesses. In other words, the Commonwealth initially was willing to give them the benefit of the doubt, they stopped doing this, but kept going. What they did, and the agent will explain it to you, they were restrained from doing one thing, they started up a second corporation, Universal, doing basically

the same thing. They were doing exactly the same thing; In one case, a person in Maine, I

Tr. 5

believe it was, wrote to Diversified by Universal and kept right on going. So that's all I'm going to give you this morning.

KEVIN MCDONOUGH,

a witness called by the Federal Grand Jury, being first duly sworn by the Foreperson, was examined and testified as follows:

EXAMINATION BY

MS. STANLEY:

Q. Would you state your full name for the grand jury, please?

A. My name is Kevin McDonough.

Q. Where are you employed, Mr. McDonough?

A. With the Postal Inspection Services in Boston.

Q. What is your position?

A. I'm a Postal Inspector.

Q. Are you the same Kevin McDonough that testified before this grand jury on April 16, 1981?

A. Yes, I am.

Q. Are you the Case Agent involved in the matter involving Peter Porcaro and Francis Grenga?

A. Yes, I am.

Q. Now, Mr. McDonough, since the day you testified last on this case, have you learned other matters or learned

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that certain of the matters about which the grand jury was given information were in fact incorrect? I don't know if they were incorrect, I think maybe they could be clarified more at this point.

Q. First of all regarding Diversified

and specifically involving the restraining orders and injunctions.

A. Why don't I read them.

Q. First of all, is it correct to say that the company Diversified Products was not restrained from doing business, but restrained from certain business practices?

A. Yes.

Q. And you have the restraining order there?

A. Yes.

Q. Could you tell us what they were restrained from doing?

A. I have the preliminary injunction first. Would you like me to go through this in order?

Q. The restraining order from Diversified?

A. Summons on restraining Order.

Q. Would you first of all, what is the date on the restraining order?

A. October 28, 1976.

Q. And what did the restraining order say?

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A. It says that--

Q. I'm sorry, before you read that, what court is that from?

A. I believe it's Middlesex County Superior Court.

Q. Is there a number on it?

A. Superior Court, civil Action, Number 76-5358.

Q. What does the restraining order portion of it say?

A. Prior to the restraining order part it has a date, show cause hearing date, and it says, "In the meantime, until such hearing, we command you, said Diversified Products Corp. d/b/a National Marketing Company and Peter J. Porcaro

and stipulate as to the entry of the preliminary injunction as follows: One, that the Defendants be enjoined from conducting, concluding or executing any contract for the sale of distributorships based upon advertising which is not in accordance with the terms of this preliminary injunction. This shall not preclude the defendants from providing goods and services to distributors not presently parties to this complaint. "Number Two. That the Defendants be enjoined from advertising the sale of distributorships by the use of A, projected earnings for which there is no substantiation based on past performance of such distributorships. B, statements alleging that the distributorship accounts selected will be high traffic accounts unless they can be based upon surveys

on Market Data substantiating such statements. And C., making any statements as outlined in A and B above, in any sales presentations to potential purchasers of distributorships." And it's signed Diversified Products

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corporation, by its attorney, Richard J. DeAngeles and the Commonwealth of Massachusetts by William Green, Assistant Attorney General in Boston.

Q. Do you know based upon your investigation whether or not Diversified Products desisted and ceased and required in the injunction?

A. They did not.

Q. Would you tell us what they did about the time of that injunction?

A. About the time of this injunction or shortly thereafter, they changed names, reincorporated and began business

under the name of Universal Marketing Corporation.

Q. Do you know the practices in which they engaged, first of all to their advertising? Whether or not they were the same procedures which they were enjoined from doing as Diversified?

A. Yes.

Q. With regard to the claims that were made to potential buyers, were those claims different or the same from which they were enjoined?

A. The claims were the same.

q. Do you know whether or not any potential buyer purchased or answered any Diversified ads ended up with Universal?

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A. yes. There was at least one. I believe two or more that I know of. One person in particular answered a

Diversified Products ad, and when he got his contract, it was Universal Marketing contracts issued.

Q. Do you know who that person was?

A. Yes. Mr. J. R. Witman from North Windham, Maine.

Q. Now at a later date was a restraining order issued against Universal Marketing Corporation?

A. Yes.

Q. Do you have a copy of that restraining order with you?

A. Yes, I do.

Q. From what court was that issued and on what date?

A. It was issued on April 25, 1977, Norfolk County Superior Court.

Q. Do you have the number?

A. Number 121262.

Q. Would you tell us, please, what that temporary restraining says?

A. It notifies the Defendants of a meeting to be held at the court house on Thursday, the 20th of April, 1977 at 9:30. "At which time they will appeaar and show cause why this application should not be granted. In the meantime, until such hearing, which commands Tr. 11 you, said Defendant and your agents, attorneys and counsel and each and every one of them to desist and refrain from accepting and or receiving any monies pursuant to any distributorship agreement already executed or pursuant to any such agreement contemplated or in the process or being negotiated. We further command you, the said Defendants, your agents, attorneys and counsel and each and every one of them to desist and refrain from making any representations

to any consumer which representation is designed to sell distributors and will still further command you to said Defendants and your agents, attorneys and counsels and each and every one of them to desist and refrain from transferring out of the Commonwealth both to any person or entity.

Q. For your information they were refrained from transferring any funds or property out of the Commonwealth or to transferring them to other parties. Do you have the injunction there?

A. Yes.

Q. Against Universal Marketing?

A. Yes.

Q. From what court was that issued?

A. Norfolk County Superior Court.

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Q. Do you have the date?

A. Yes. That was entered by the Court on May 5, 1977.

Q. And the number?

A. Number 121262.

Q. And would you please read that to us?

A. This section to be further heard at this sitting upon a return of an order of notice to show cause why the application for preliminary injunction whould not be granted. It was argued by counsel and thereupon upon consideration thereof, it is ordered by a judge that upon payment to a clerk the sum of $5.00, the application under the prayers of the complaint, hereby is granted and the Defendant Universal Marketing Corp., et al enjoin and restrain from; Number One, advertising in any form the sale of business opportunities, schemes or

salaries as income represented unless the salary or income is equal to or less than the average salary or income of persons employed less than five years in the indicated position in the Commonwealth. Number two, representing that various business opportunities or schemes are profitable unless such profitability is able to establish through data showing average income of all such opportunities sold in the period of time reqpresented by such income.

Tr. 13

figures. Number three, representing that locations for such business schemes are professionally selected unless such election is based on sound business criteria."

Q. And prior to the issuance of that preliminary injunction, do you know whether or not Universal Marketing

continued in business?

A. Both prior and subsequent to that.

MS. STANLEY: Do the grand jurors have any questions at this point?

(There was no response).

MS STANLEY: Thank you.

(Wherein the witness was excused.)

MS STANLEY: Now what I'm going to do is read to you the changes in the indictment, there weren't that many. They reflect primarily what the injunctions said. And also, so that you do know, there are in the indictment a number of counts, approximately four which shows on June 10, 1977 in fact they began talking with Mr. campbell who you heard from earlier, Universal Marketing with regards to selling distributorships. Also on May 26, which is about three weeks later they began corresponding with Roger Hincks who you

heard from. And

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at the end of May, May 31 they began with Mr. Maquire who you also heard from. So that after the injunction was issued, in fact they did business.

Basically what has been added to the indictment that you did not have before in Count One, Paragraphs 26 through 33 have been altered and I will just read them to you.

"It was further part of the scheme and artifice to defraud for the Diversified Products d/b/a National Marketing Corporation and Peter Porcaro, their agents and employees to continue concluding and executing contracts for the sale of distributorships after they were restrained from doing so by the Middlesex County Superior Court in the Commonwealth of Massachusetts on or about Obtober 27,1976.

28. It was further part of the scheme and artifice to defraud for the Diversified Products d/b/a National Marketing corporation, and Peter Porcaro, their agents and employees to continue to A0 conclude and execute contracts for the sale of distributorships; B) advertise the sale of distributorships using projected earnings for which there were not substantial bases; C0 advertise that distributorship accounts would be "high traffic" accounts without